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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1108

In the Matter of the Petition of KARINA T. CORPORATION as Owner of the Fishing Vessel *Karina T.* in a Cause of Exoneration From and Limitation of Liability

BRIDGET BARRON, etc., et al.,

Claimants-Petitioners,

v.

KARINA T. CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Question Presented

Where substantial evidence established that a seven year old fishing vessel was lost in an unprecedented storm, that she had a long record of staunchness, stability, sound construction and careful maintenance, and that the remnants of her wreck were worthless, will this Court review and reject, as clearly erroneous, the Trial Court's findings of fact grounded on such proofs?

Statement of the Case

At 6:00 A. M. March 6th, 1962, while the Fishing Vessel *Karina T* was fishing off the Jersey Coast, her master radio-telephoned respondent's president, at his home, reporting a storm of great intensity with winds of seventy miles an hour from the northeast and rough seas. He said that the vessel was performing ably, that she was "lying just like a duck in the water" and taking no water although the weather was "very rough" [b 72, 85]*.

The Weather Bureau prediction was that the winds would change to northwest and diminish on the evening of March 6th [P. Ex. 1, pp. 11, 12]. In view of this report the master stated his decision to the owner's president to await the weather change and then proceed into Point Pleasant, New Jersey, his original departure point. He intended to arrive on the morning of March 7th [b 72-85]. That was the only communication between the master and respondent.

The wind direction and force did not change as predicted. It increased in great violence and blew from the northeast during the next sixty hours [b 34]. Further efforts by the owner to reach her were unsuccessful during the three day storm. Two other fishing vessels at sea were in radio-telephone contact with her on March 6th and 7th. During those conversations neither her master nor others aboard her, said or gave any indication that she was experiencing any difficulty about her hull, engine or appurtenances. She, like the other fishing vessels, was being driven by the northeast gales and tidal current in a southwesterly direction during March 7th [b 27-31, 104]. Fruitless measures were taken by her owner and the Coast Guard, both with air and sea craft, to locate her. On or about March 22nd

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* Numerals followed by "b" refer to Appellee's Appendix in the Court of Appeals, filed herein.

the Coast Guard found the remains of her wrecked pilot house on the beach of Assateague Island off the Virginia Coast, a distance of about one hundred twenty miles southwest of Barnegat Light Ship where she was last spoken by the other fishing craft [P. Ex. 8].

Assateague Island was covered with water by the storm [a 19]*. The northeast gales blew all vessels southwesterly. The coastal area between Barnegat and Assateague is heavily shoaled [b 34, 35]. Petitioners' own witness testified "it's a graveyard of ships; there is no question about that. And a storm of that magnitude would be very rough and unpleasant and an unhealthy place to be" [b 150].

The snapshots of the wreckage remains are stark evidence of the storm's destructive force against a vessel in the shoals, and that those remains were, beyond question, worthless [5a, 6a, 8, 9].

The uncontradicted testimony of an experienced fishing master was that the wreck parts had no value whatsoever [b 22].

Two striking portions of the testimony relating to the storm are mentioned in the Trial Court's opinion, one by respondent's witness, Hansen, and the other by petitioners' witness, Biktjorn [17a, 19a, App. to Petition]. Hansen said that the wind surpassed 100 miles per hour, that it was the worst storm in his 50 years' experience [b 32-34, 106]. Biktjorn's vessel was bound into New York but wound up in Portsmouth, Virginia. For three days he said "we were going up against the wind and going backwards" [b 152]. Both vessels were damaged. They were larger than the *Karina T* [b 24, 152].

After a six day trial, with 1000 pages of testimony and 74 exhibits, the Trial Judge, who was long experienced in

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* Numerals followed by "a" refer to Appellants' Appendix in the Court of Appeals, filed herein.

deep sea navigation [b 150], conscientiously evaluated the evidence, as his opinion shows, and made careful findings which are now again under attack. But no evidence is pointed to in the futile claim that they are clearly erroneous.

Reasons for Denial of the Writ

1. The Court of Appeals heeded this Courts' instruction in *McAllister* v. *United States*, 348 U. S. 19, 75 S. Ct. 6, for it wrote that it could not say that the trial record did not sustain the District Court's findings requiring exoneration. [Appendix to Petition, 31a.] The petition here is replete with fact references and arguments. The meringue of law throughout it does not conceal the design to have this Court review *de novo* a fact situation, precisely what the mandate of *McAllister* was directed against.

2. Numerous misstatements of evidence are made in the unwarranted attack upon the findings:

The petition charges negligence on the master in failing to head for New York on that morning of March 6th, and it is said that respondent was in privity to the alleged fault. This rests on the bald statement that Tobiasen, respondent's president, ran the operation of the *Karina T*, was in control of her movements by radio-telephone and ordered her into Point Pleasant [Petition, p. 10]. These statements are not supported anywhere in the record. The District Court reviewed Tobiasen's testimony in its opinion:

> "Tobiasen stated that Manasquan Inlet in a northeast storm is a very difficult channel to enter and that he did not tell Captain Jorgensen what to do or where to make port as he had full confidence in the captain's ability as a commanding officer and he felt that Jorgensen knew the conditions and could better judge the situation" [App. to Petition, pp. 9a, 10a].

Tobiasen testified in his simple manner:

> "I had nothing to do with it. He was the captain • • • he knew more than I do about it" [a 170].

He could not control the vessel's movements by radiotelephone for he talked only once to Jorgensen at 6:00 A. M. March 6th and never thereafter [b 74].

The record references, at page 10 of the petition, to the claim that Tobiasen ordered the vessel into Point Pleasant do not support the statement at all. Those points in the record [a 123-125, 168] relate solely to a description of methods of marketing fish at New York and Point Pleasant.

Space does not permit a review of other numerous inaccuracies in the petition on the subjects of the vessel's construction and alleged unseaworthiness. Record references in the petition are to testimony of petitioners witness, Tiedemann, who was offered as an expert. He was shown to be thoroughly unqualified and the District Judge noted this in his opinion [App. to Petition, 20 a].

Of the many scattergun charges of unseaworthiness, one of prime example relates to the afterhouse [Petition, p. 7]. It is said that the afterhouse "was added after the pilot house was built", that it "was torn from its deck plate for it was not properly joined or integrated with the pilot house", and that it was "vulnerable".

In his opinion the Trial Judge set forth at length testimony that the pilot house and afterhouse were of an integral construction, that the afterhouse was secured with four tie rods on each side and one in the middle of the stern, that these rods started at the top of the afterhouse and went underneath the cross beams and were further secured with bolts that went through the deck and into and through the timbers and that these bolts were secured with washers and nuts at the bottom of the timbers; that the

pilot house was secured in pretty much the same manner, with tie rods fastened to the trunk, three in front and three in back [App. to Petition, 8a, 10a, 11a, 14a, 15a, 17a]. The testimony supported this statement [b 9, 23, 44, 45, 48, 49, 62, 64, 77, 78, 85]. (Photographs taken during the building of the vessel destroyed Tiedeman's testimony [b 148, P. Exs. 27, 28].) Petitioners' problem is that the Court accepted testimony of expert and fact witnesses, all of whom saw and examined the structures, and it rejected testimony of an unqualified "expert" who gave his opinion solely from the snapshots of the wrecked pilot house [Cl's. Exs. 7, 8, b 132, 136].

This subject is extended here to show how unreliable are the statements of facts in the petition at page 7. The other "facts" in the petition are equally misleading and it would serve no useful purpose to review them *seriatim*.

3. The subject of the wreck is overplayed in the petition for it is plain from the views of the remains of the house, lying awash on an oceanswept island off Virginia that it was worthless. It was clearly not susceptible of easy removal and preservation, as petitioners contend should have been done. They complain that no measurements were taken nor survey held. Both Carl Tobiasen and his son went to Assateague, under distressing conditions, to identify the wreck of the *Karina T.* Certainly they had no cause to conceal anything, nor did they have reason to believe that some day months later some attorney would raise unfounded questions as to their alleged failure to preserve what remained of the vessel they once prized so highly. All of the arguments in the petition are hindsight and thin.

The petition twice charges that Tobiasen swore falsely in his affidavit that there was no value to be surrendered—that "there was no salvage resulting" [Pet. pp. 3, 5]. Like the others, this wild charge is intended to arouse interest in a groundless application. The petition was filed,

on September 10th, 1962, with "Petitioner's Affidavit Of No Value to be Surrendered". Both stated that the vessel was a total loss and that there was no salvage resulting, "Wherefore her value for limitation purposes was nil" [a 277, 278]. And so the petitioner prayed that its liability, if any, should be limited to its interest in the vessel "which is nil" [a 5].

Since, as the proof showed, the remnants had no value whatsoever, and the Trial Court has so found, that settles the question [b 22, App. to Petition 23 a]. For it is obvious that while ordinarily a stipulation for "value" would accompany the limitation petition, if there is no value in existence, there is none to be surrendered. Further, the word "salvage" carres with it the meaning that something of value or monetary worth is capable of recovery. The cost might well exceed the wreck's value where it lies so that there would be "no value resulting". Here were a few battered timbers in the surf on the island off the coast, unworthy of the term "value" even where they were lying. We submit that, on the record, petitioners do Captain Tobiasen a grave injustice in charging him with perjury.

The Trial Court said of him and his witnesses: "I think the men are very solid, fine, simple, excellent people • • •. These Scandinavian witnesses that we have had, I have had a good deal of respect for their integrity, I'll tell you that. They are fine honest people. They do their best with the truth. I am convinced of that. I wish the rest of us did as well". Counsel for the present petitioners said that he "wholeheartedly agreed" with the Court's statement [b 86, 88]. Adversity has apparently changed his views.

4. The decisions below rest on the peculiar facts of this case so that a review of the findings and proofs would not be of general interest, as the petition states. No conflict of authorities is put forward as a reason for granting the writ. Even assuming that some interesting law points are

raised, which is doubtful, we respectfully suggest that they might be more deserving of this Court's attention where the factual picture is less confused than that presented by the present petition.

CONCLUSION

For the reasons stated a writ of certiorari should be denied.

Respectfully submitted,

FRANK C. MASON,
Attorny for Respondent.